

The record considered by the Board and the parties' stipulations are listed in the November 4, 2010, Award; the November 18, 2010, Award Nunc Pro Tunc; and the June 5, 2012, Order. The record also includes the transcript of the May 22, 2012, regular hearing. In the November 18, 2010, Award Nunc Pro Tunc, ALJ Marcia L. Yates ruled the average weekly wage of claimant for all applicable periods through September 6, 2006, was \$644.19. At oral argument before this Board on February 18, 2011, the parties stipulated to this figure. At oral argument on October 19, 2012, the parties stipulated to the

following: (1) claimant's left wrist and elbow injuries arose out of and in the course of his employment with respondent; (2) neither party was contesting the SALJ's findings that claimant sustained a 10% functional impairment to the left wrist and a 10% functional impairment to the left elbow; (3) the exhibits to all preliminary hearings are part of the record; and (4) neither party is contesting the SALJ's findings concerning payment of medical mileage and unauthorized medical treatment.

ISSUES

The procedural history of these claims and the findings of the ALJ and SALJ that decided this claim are set out in more detail below. ALJ Yates issued an Award on November 4, 2010, and a Nunc Pro Tunc Award on November 18, 2010. They were appealed to the Board, which remanded the claims. Following remand, SALJ Shelor issued an Order on June 5, 2012. The findings made by the ALJ and SALJ that are in issue are centered on claimant's right shoulder injury and temporary total disability (TTD) benefits. The ALJ and SALJ found that claimant sustained a right shoulder injury by accident arising out of and in the course of his employment and sustained a 5% functional impairment to the right shoulder. They also determined claimant was entitled to 73 weeks of TTD benefits and apportioned the 73 weeks equally among claimant's left wrist, left elbow and right shoulder awards.

Respondent requests that the Board find claimant did not suffer a permanent impairment to his right shoulder. Respondent also requests a credit for an alleged overpayment of TTD benefits from October 20, 2008, through July 21, 2009. Additionally, respondent asserts the total number of weeks of TTD benefits awarded should be deducted from each and every scheduled injury.

Claimant contends he suffered two separate series of repetitive traumas arising out of and in the course of his employment. Claimant asks that the Board affirm the ALJ and SALJ's findings in all respects.

The issues before the Board on this appeal are:

1. Did claimant sustain a right shoulder injury by accident arising out of and in the course of his employment with respondent?
2. If so, what is the nature and extent of claimant's disability?
3. Is respondent entitled to a credit for an alleged overpayment of temporary total disability benefits from October 20, 2008, through July 21, 2009?
4. How should the weeks of temporary total disability benefits be apportioned among claimant's awards?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

In Docket No. 1,025,085, filed on September 6, 2005, the date of accident alleged is a "series of repetitive traumas commencing in July 2005 through August 1, 2005."¹ Claimant initially listed left elbow, left arm and body as a whole as the extent of his injuries and later also included right elbow and right arm. In Docket No. 1,032,810, filed on January 23, 2007, the date of accident alleged is a "series of repetitive traumas for each day worked through September 2006."² In that claim, claimant listed right elbow, right arm, left elbow, left arm and body as a whole as the extent of his injuries.

Claimant was employed by respondent as a mold maker and ran a sand machine. The machine was on a stand about four feet off the ground. In order to operate the machine, claimant would have to reach over his head and manhandle the machine. In 2005, claimant began noticing pain in his left elbow, which he attributed to operating the sand machine.

Claimant testified that after initially developing symptoms of pain in his left arm in the summer of 2005, he saw Dr. Growney, who prescribed physical therapy. Dr. Growney's medical records were not placed into evidence. When treatment prescribed by Dr. Growney did not relieve claimant's symptoms, he was referred by Dr. Growney to Dr. Tom Shriwise, who performed left cubital tunnel surgery in September 2005. After recovering from surgery, claimant returned to his same position and duties. In a disability report dated February 27, 2006, Dr. Shriwise indicated claimant had reached maximum medical improvement (MMI). He gave claimant no restrictions and opined claimant had a functional impairment to the left upper extremity of 1-2%. That is the only medical record of Dr. Shriwise that was made part of the record.

Claimant testified that after returning to work, he began developing symptoms of pain in his right wrist and right shoulder. On March 23, 2006, at the request of his attorney, claimant was evaluated by Dr. Michael J. Poppa, a board-certified occupational medicine physician. After evaluating claimant, Dr. Poppa stated in his report, "He [claimant] also states he has started to experience right upper extremity/elbow pain complaints since he has been favoring his right arm while performing his regular work duties."³ Dr. Poppa recommended conservative treatment, but if it was not successful in alleviating right cubital

¹ Application for Hearing (filed Sept. 6, 2005) and amended Application for Hearing (filed May 31, 2006).

² Application for Hearing (filed Jan. 23, 2007).

³ P.H. Trans. (May 16, 2007), Cl. Ex. 2.

tunnel symptoms, a surgical consultation might be necessary. There is nothing in the report referencing claimant's right shoulder. In a letter dated May 5, 2006, to claimant's attorney, Dr. Poppa indicated claimant was not desirous of surgical intervention for the right cubital tunnel syndrome. The doctor then opined claimant had reached MMI and gave claimant a 20% functional impairment to the right upper extremity and a 30% impairment to the left upper extremity. Using the Combined Values Chart, Dr. Poppa determined claimant had a 28% whole body impairment. Again, no mention was made of claimant's right shoulder.

Dr. Poppa again evaluated claimant on February 8, 2007. The only reference to claimant's right shoulder was that claimant complained of lack of strength in his right arm with pain that radiated from the right elbow into the shoulder.⁴ In his report, Dr. Poppa quoted claimant as stating, "This has still been going on with my right arm since I was last here."⁵ Nevertheless, Dr. Poppa did not diagnose claimant with a right shoulder injury.

On May 23, 2006, ALJ Bryce D. Benedict appointed Dr. Lynn D. Ketchum as a neutral examiner to "[r]ate such impairments that are alleged to have resulted from the claimant's employment, by using the appropriate edition of the *AMA Guides*."⁶ On August 14, 2006, claimant was examined by Dr. Ketchum, but ALJ Benedict did not receive a report from Dr. Ketchum until October 24, 2006. Dr. Ketchum diagnosed claimant with very mild bilateral cubital tunnel syndrome and recommended claimant undergo an MRI of both wrists. On January 10, 2007, after claimant underwent an MRI of both wrists, Dr. Ketchum wrote a supplemental report to ALJ Benedict stating claimant had very mild right cubital tunnel syndrome, but he did not require surgery at that time. Neither the August 14, 2006, report nor the January 10, 2007, letter reference a right shoulder complaint or injury.

On May 17, 2007, ALJ Benedict ordered claimant to return to Dr. Ketchum for an additional independent medical evaluation so Dr. Ketchum could "(1) make a diagnosis; (2) opine whether this is related to the employment; (3) make treatment recommendations; (4) to impose any work restrictions; (5) to provide a rating if the Claimant is at MMI."⁷ Dr. Ketchum examined claimant on May 31, 2007, and in a letter dated the same day to ALJ Benedict, Dr. Ketchum indicated claimant was at MMI. He accorded claimant a 15% functional impairment to the right upper extremity, excluding the right shoulder, and a 5% functional impairment to the left upper extremity. Dr. Ketchum assigned the ratings "[o]n the basis of mild cubital tunnel syndrome and mild compression of the ulnar nerve at the

⁴ *Id.*

⁵ *Id.*

⁶ ALJ Order (May 23, 2006) at 1.

⁷ ALJ Order (May 17, 2007).

wrist on the right and mild residual cubital tunnel syndrome on the left.”⁸ Regarding claimant’s right shoulder, Dr. Ketchum recommended claimant see a shoulder specialist and ultimately be rated by that specialist.

In a February 15, 2008, Order ALJ Benedict authorized Dr. Steven L. Hendler to provide treatment for claimant’s upper extremities, except the shoulders, until claimant reached MMI.

Claimant testified at the June 25, 2008, preliminary hearing that he had been terminated in September 2006 by respondent for absenteeism because he missed work to seek medical treatment for his injuries. When claimant brought notes to work from doctors excusing his absenteeism, respondent would throw the notes in the trash and count claimant absent.

Following the June 25, 2008, preliminary hearing, SALJ Jerry Shelor issued an Order on June 30, 2008, awarding claimant TTD benefits commencing March 24, 2008. It appears this was based upon a work status report of Dr. Hendler dated March 24, 2008, wherein he restricted claimant from any repetitive work with his left arm and noted the modifications were temporary.⁹ Work status reports from Dr. Hendler from March 24, 2008, through June 13, 2008, and from Dr. Paul F. Nassab from April 14, 2008, through June 23, 2008, were introduced. Those reports did not make reference to a right shoulder injury. The Order also authorized Drs. Hendler and Nassab to provide treatment for claimant until he reached MMI.

Dr. Hendler’s notes of October 20, 2008, indicated he had previously seen claimant for an independent medical evaluation and claimant was now referred back for treatment. Respondent and its insurance carriers believed TTD benefits should be terminated due to Dr. Hendler stating in notes from that visit that claimant could return to regular duty.¹⁰ A work status report signed by Dr. Hendler on the same day indicated claimant could return to regular duty. At a May 6, 2009, preliminary hearing respondent requested TTD benefits be terminated. A work status report dated November 11, 2008, signed by Dr. Hendler indicated claimant could return to regular duty. The medical records of Dr. Hendler introduced at the May 6, 2009, preliminary hearing indicated he continued to see claimant several more times through April 21, 2009. Dr. Hendler’s notes from nearly every visit indicated one of his impressions was “[r]epetitive strain, right arm, consider entrapment neuropathy(ies).”¹¹

⁸ Ketchum Report (May 31, 2007) at 2.

⁹ P.H. Trans. (June 25, 2008), Cl. Ex. 1.

¹⁰ P.H. Trans. (May 6, 2009), Resp. Ex. A.

¹¹ *Id.*, Resp. Exs. A and B.

At the May 6, 2009, preliminary hearing, respondent introduced Dr. Nassab's January 2009 referral of claimant to physical therapy and notes from January 21 and February 27, 2009, appointments. The February 27 notes indicated that an EMG of claimant's left wrist was unchanged. Dr. Nassab stated, "At this point, there is nowhere else I know where to go."¹² He then recommended claimant obtain a second opinion. Dr. Nassab's notes indicated he would see claimant one more time after the second opinion was obtained, "but again short of any new information, there is nothing else I know to do and that will be the last treatment I will be able to offer because I do not know where else to go with it."¹³

Claimant introduced two work status reports signed by Dr. Nassab. The first was dated January 21, 2009, and indicated claimant could return to modified duty with restrictions noted below. Below Dr. Nassab wrote "Lt Hand No push pull lift carry."¹⁴ The February 8, 2009, work status report imposed the same restrictions.

Claimant testified at the May 6, 2009, preliminary hearing that he was still actively treating with Drs. Hendler and Nassab. He acknowledged that prior to January 2009, Dr. Hendler had prescribed Mobic and Gabapentin and that he had undergone three EMG tests. Claimant testified that Dr. Nassab had recommended physical therapy and for claimant to see a physician at the University of Kansas Medical Center, but neither had been scheduled.

In a May 8, 2009, Preliminary Hearing Order, ALJ Rebecca Sanders noted that Drs. Hendler and Nassab recommended a second opinion should be obtained. She concluded that claimant had not reached MMI. She ordered TTD benefits paid under the provisions of the June 30, 2008, Order.¹⁵ ALJ Sanders' May 8, 2009, Preliminary Hearing Order was appealed to this Board. A member of this Board determined the Board had no jurisdiction to review the Preliminary Hearing Order.¹⁶

At the request of respondent, on July 21, 2009, claimant was examined by orthopedic specialist Dr. Anne R. Rosenthal. She reviewed the medical records of Drs. Ketchum, Hendler and Nassab and physically examined claimant. However, from Dr. Rosenthal's report, it appears she focused on claimant's left upper extremity and did

¹² *Id.*, Resp. Ex. C.

¹³ *Id.*

¹⁴ *Id.*, Cl. Ex. 1.

¹⁵ ALJ Preliminary Hearing Order (May 8, 2009).

¹⁶ *Housh v. Atchison Casting Corporation*, Nos. 1,025,085 & 1,032,810, 2009 WL 2480242 (Kan. WCAB July 22, 2009).

not examine claimant's right shoulder. When deposed, Dr. Rosenthal explained that claimant made no complaints about his right shoulder. Even if he did make right shoulder complaints, Dr. Rosenthal would not have examined the right shoulder as she does not evaluate shoulders. She testified claimant was a malingerer and was faking his left upper extremity symptoms.

Dr. Rosenthal testified that there should not be an increase in claimant's symptoms after he was released to return to work by Dr. Hendler on October 20, 2008. She indicated claimant's complaints were made up. Dr. Rosenthal testified that any subjective complaints by claimant would not be truthful. At the time Dr. Rosenthal was deposed, claimant was being treated by Dr. Hendler.

ALJ Sanders, in a November 4, 2009, Order, appointed Dr. Vito J. Carabetta as an independent medical examiner to: (1) rate claimant's impairments using the *AMA Guides*; (2) if claimant had preexisting impairments to rate those impairments using the *AMA Guides*; (3) if any of claimant's current impairments are unrelated to his employment to provide an explanation; and (4) provide a report to the ALJ and the parties.

On December 30, 2009, Dr. Carabetta physically examined claimant and took a history from him. Dr. Carabetta's report indicated he reviewed the medical records of Drs. Growney, Shriwise, Poppa, Ketchum, Nassab and Hendler. Claimant presented to Dr. Carabetta with a chief complaint of bilateral upper extremity dysesthesias and with complaints more bothersome on the left side than the right. Claimant reported experiencing a burning sensation, stabbing pain and tingling numbness from the left forearm and continuing into the hand along the ulnar border. The complaints were constant, but the intensity of the pain was intermittent. At the right shoulder, claimant reported experiencing nonfocal aching pain that was intermittent. The pain could be absent for a day, but once the symptoms occur, they lingered on for several days. Claimant reported that activity aggravated his right shoulder.

Dr. Carabetta's report indicated claimant's upper extremity range of motion was full normal for all joints, in all planes, but at the right shoulder claimant reported an increase in symptoms at end range with any and all movements. Manual muscle testing in the upper extremities revealed 5/5 strength overall. Palpation was noteworthy for an absence of any focal spasm or tenderness in either of the upper limbs. The apprehension test for shoulder dislocation was normal on either side. The supraspinatus tendinitis test was negative for any signs of impingement syndrome on either side. The drop arm test for rotator cuff tear was negative bilaterally. Yergason's sign, Adson's test and Allen's test were negative on both sides. Dr. Carabetta's impressions were: (1) status-post left ulnar nerve transposition; (2) status-post left ulnar nerve release in Guyon's Canal; and (3) right shoulder pain. Dr. Carabetta's functional impairment ratings are set out in ALJ Yates' Award.

With regard to the right shoulder, Dr. Carabetta stated in his report:

We next consider the right shoulder subjective complaints of pain. He really has not had any significant diagnostic workup pursued, and in reality the clinical examinations have been rather unremarkable previously, as it was at this time. Based on his subjective right-sided complaints alone, and comparing his presentation to other diagnostic entities with regard to the right shoulder that are indeed listed in the *Guides*, a 5 percent impairment of the right upper extremity would appear appropriate.¹⁷

At the July 13, 2010, regular hearing, claimant testified he told Drs. Carabetta, Ketchum, Hendler, Rosenthal and Poppa that his primary complaint was about the right shoulder. He also stated that he was currently being treated by Dr. Hendler and was taking four prescriptions for his work-related injuries. When asked what was wrong with his right shoulder, claimant testified that if he picked something up with his right hand over his head, he could feel it rip or tear in the front of the shoulder. Claimant also indicated that he cannot put his right hand behind his back. He testified that he never had active treatment to his right arm.

ALJ Yates entered an Award on November 4, 2010. In Docket No. 1,025,085, the ALJ: (1) determined claimant sustained a 10% functional impairment to the left wrist, a 10% functional impairment to the left elbow, and a 5% functional impairment to the right shoulder, all attributable to the work-related injuries; (2) denied claimant's request for 41 weeks of additional TTD benefits, as there was no evidence in the record as to what period of time claimant was claiming the underpayment or his entitlement to it; (3) denied respondent's request for a credit for an alleged overpayment of TTD benefits from October 20, 2008, through July 21, 2009; (4) granted claimant's request for medical mileage with the exception of travel on January 6 and July 13, 2010; and (5) granted claimant's request for reimbursement of unauthorized medical expenses in the amount of \$500.00.

In Docket No. 1,032,810, ALJ Yates impliedly found claimant met with personal injury by accident arising out of and in the course of his employment with respondent. She found that after being given restrictions, claimant returned to restricted work duties and developed right shoulder complaints. The right shoulder complaints were the natural and probable consequence of claimant's original injury and, therefore, compensable.

On November 18, 2010, ALJ Yates issued an Award Nunc Pro Tunc, indicating the parties had stipulated to an average weekly wage of \$644.19 through September 6, 2006, and that beginning September 7, 2006, claimant qualified for the maximum benefit rate of \$467 per week. Temporary total disability benefits were awarded at \$429.46 per week. The apportionment of the 73 weeks of TTD benefits did not change. Respondent appealed ALJ Yates' Award and Award Nunc Pro Tunc.

¹⁷ Carabetta Report (Dec. 31, 2009) at 4.

The Award and Award Nunc Pro Tunc of ALJ Yates did not indicate any of Dr. Ketchum's reports were part of the record. At the July 13, 2010, regular hearing, none of the parties requested that Dr. Ketchum's reports be made part of the record.¹⁸ In an April 22, 2011, Order this Board remanded the claims to the ALJ for further decision on all issues with instruction that the ALJ was to include Dr. Ketchum's medical reports as part of the record.

SALJ Shelor was assigned the claims on remand. He issued a June 5, 2012, Order, which stated:

After consideration of prior Administrative Law Judge's opinions and findings it is determined that Dr. Carabetta's report more accurately quantifies claimant's condition due to the fact that claimant's medical condition was more determinative subsequent to Dr. Ketchum's report that was completed years earlier. The Court after review of Dr. Ketchum and Dr. Carabetta's reports hereby adopts the Independent Medical Evaluation of Dr. Carabetta for rating purposes. These ratings include a 10% functional rating to the left wrist, a 10% functional impairment to the left elbow and a 5% functional impairment to the right shoulder, all attributable to the work related injuries. Further findings, issues and calculations determined by Administrative Law Judge Yates in her November 4, 2008 *[sic]* Award and Award Nunc Pro Tunc of November 18, 2010, are hereby adopted.

Specifically, it is determined that based on the impairment ratings for the left wrist, left elbow and right shoulder the 73 weeks of temporary total disability benefits are apportioned among the three awards of disability benefits, i.e. 24.33 weeks of temporary total disability benefits for each award.¹⁹

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.²⁰ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²¹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

¹⁸ R.H. Trans. (July 13, 2010) at 9-10.

¹⁹ SALJ Order (June 5, 2012) at 2.

²⁰ K.S.A. 2005 Supp. 44-501(a).

²¹ K.S.A. 2005 Supp. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.²²

The first issue that must be resolved is whether claimant sustained a right shoulder injury by accident arising out of and in the course of his employment. The first medical record in evidence that indicates claimant sustained a right upper extremity injury was Dr. Poppa's March 23, 2006, report. However, that report indicated claimant had right cubital tunnel syndrome and did not mention the right shoulder. When Dr. Poppa evaluated claimant a second time on February 8, 2007, he did not give a diagnosis for the right shoulder. Dr. Poppa only gave a functional impairment for claimant's right elbow, based upon right cubital tunnel syndrome.

The first reference in the record by a physician of a right shoulder injury was in Dr. Ketchum's May 31, 2007, letter to ALJ Benedict. Dr. Hendler's notes from October 20, 2008, through March 21, 2009, indicated claimant had a repetitive strain, right arm, but did not specifically mention the right shoulder. At the May 16, 2007, preliminary hearing, claimant testified that he had shooting pain in his right arm and that he made right shoulder complaints to nearly all the physicians he saw. Yet only the reports of Drs. Ketchum and Carabetta refer to a shoulder injury. No diagnostic test of claimant's shoulder was ever ordered and claimant never received active treatment for a right arm or shoulder injury. The Board finds there is insufficient evidence to find that claimant sustained a right shoulder injury by accident arising out of and in the course of his employment. Therefore, the issue of the nature and extent of claimant's right shoulder disability is moot.

The next issue is whether claimant was entitled to TTD benefits from October 20, 2008, through July 21, 2009. SALJ Shelor authorized both Dr. Steven L. Hendler and Dr. Paul F. Nassab as authorized treating physicians.²³ From October 20, 2008, claimant was released to return to regular duty by Dr. Hendler. Dr. Hendler never altered that opinion. The January 21 and February 8, 2009, work status reports of Dr. Nassab restricted claimant from pushing, pulling, lifting or carrying with his left hand. Therefore, from October 20, 2008, through January 20, 2009, claimant was not temporarily totally disabled, as he was under no restrictions.

Claimant was terminated by respondent in September 2006, and at the July 2010 regular hearing testified he had not worked anywhere since. Even with the restrictions placed upon claimant by Dr. Nassab, there were jobs available for claimant in the open labor market. On February 27, 2009, Dr. Nassab indicated he did not know what else to

²² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

²³ SALJ Order (June 30, 2008). Dr. Hendler had also been appointed treating physician in a February 15, 2008, Order.

do for claimant. He referred claimant to another physician for a second opinion and short of any new information provided by that physician, Dr. Nassab was ending his treatment of claimant. Claimant never obtained the second opinion. In essence, Dr. Nassab was implying that claimant had reached MMI.

Taking into consideration the facts and analysis enunciated in the two foregoing paragraphs, the Board finds claimant was not entitled to TTD benefits from October 20, 2008, through July 21, 2009.

The final issue for review is how to apportion the weeks of TTD benefits among claimant's awards. The ALJ and SALJ chose to equally apportion the 73 weeks of TTD benefits among the three awards they made for claimant's left wrist, left elbow and right shoulder injuries. Based upon the foregoing findings, claimant has sustained left wrist and left elbow impairments and is entitled to 34 weeks of TTD benefits. Respondent argues that the number of weeks claimant received TTD benefits should be deducted from each award. Thus, the 34 weeks of TTD benefits should be deducted from claimant's left wrist award, and 34 weeks deducted from his left elbow award. Respondent asserts that the plain and unambiguous language of K.S.A. 44-510c(b)(1) and 44-510d(a) requires this.

K.S.A. 44-510c(b)(1) states:

Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to 66 $\frac{2}{3}$ % of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than \$25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 $\frac{2}{3}$ % of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a

presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

In *Barbury*,²⁴ the Kansas Court of Appeals addressed this issue. *Barbury* sustained two scheduled leg injuries and the Board held *Barbury* was entitled to 200 weeks of permanent partial disability benefits for each leg. Claimant had received 89.7 weeks of TTD benefits. For each of claimant's awards the Board subtracted 44.85 weeks of TTD benefits from the maximum of 200 weeks of permanent partial disability benefits and then calculated claimant's awards. Claimant appealed and contested the validity of K.A.R. 51-7-8(b)(1), which states:

If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

(B) multiply the difference by the percent of loss or use to the member; and

(C) multiply the result by the applicable weekly temporary total compensation rate.

The Court of Appeals in *Barbury* went through a detailed discussion of K.S.A. 44-510c, 44-510d and 44-510e and concluded that when calculating the number of permanent partial disability weeks an injured worker may receive for a scheduled injury, the number of weeks of TTD benefits must first be deducted. However, none of the parties in *Barbury* contested the finding that of the 89.7 weeks of TTD benefits, 44.85 weeks of TTD benefits would be deducted from each of the two awards for the left and right leg injuries.

Barbury was upheld by the Kansas Supreme Court in *Mitchell*.²⁵ In *Mitchell*, the Supreme Court applied a deduction of TTD benefits in cases where the injured worker had bilateral upper extremity injuries and stated, "The Board did not err by reducing the number

²⁴ *Barbury v. Duckwall Alco Stores*, 42 Kan. App 2d 693, 215 P.3d 643 (2009).

²⁵ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

of weeks assigned for Mitchell's permanent partial disability award by the number of weeks of temporary total disability awarded."²⁶

Here, the Board has awarded claimant 34 weeks of TTD benefits. Relying on K.A.R. 51-7-8 and the language of *Mitchell*, the Board deducts 17 weeks of TTD benefits from the award for claimant's left wrist and 17 weeks from the left elbow award. To adopt respondent's argument, the Board would be required to find that it awarded claimant 68 weeks of TTD benefits, or 34 weeks of TTD benefits for the left wrist and another 34 weeks of TTD benefits for the left elbow.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Claimant failed to prove by a preponderance of the evidence that he sustained a right shoulder injury by accident arising out of and in the course of his employment with respondent.

2. Claimant is awarded 34 weeks of temporary total disability benefits – 17 weeks shall be deducted from claimant's left wrist award and 17 weeks shall be deducted from the left elbow award.

AWARD

WHEREFORE, the Board finds that the November 4, 2010, Award and the November 18, 2010, Award Nunc Pro Tunc of ALJ Yates and the June 5, 2012, Order of SALJ Shelor shall be modified as follows:

Left wrist

For claimant's left wrist impairment, claimant is entitled to 17 weeks of temporary total disability benefits at the rate of \$429.46 in the amount of \$7,300.82. The 17 weeks shall be deducted from the statutory maximum number of permanent partial disability weeks for a forearm of 200 weeks, resulting in 183 weeks of permanent partial disability benefits available to claimant. Claimant has a 10% functional impairment, which when multiplied by 183 weeks equals 18.3 weeks of permanent partial disability benefits. Therefore, claimant is entitled to 18.3 weeks of permanent partial disability benefits at the

²⁶ *Id.*, at 170.

²⁷ K.S.A. 2011 Supp. 44-555c(k).

rate of \$429.46 per week in the amount of \$7,859.12, making a total award of \$15,159.94, which is all due and owing, less amounts previously paid.

Left elbow

For claimant's left elbow impairment, claimant is entitled to 17 weeks of temporary total disability benefits at the rate of \$429.46 in the amount of \$7,300.82. The 17 weeks shall be deducted from the statutory maximum number of permanent partial disability weeks for an arm of 210 weeks, resulting in 193 weeks of permanent partial disability benefits available to claimant. Claimant has a 10% functional impairment, which when multiplied by 193 weeks equals 19.3 weeks of permanent partial disability benefits. Therefore, claimant is entitled to 19.3 weeks of permanent partial disability benefits at the rate of \$429.46 per week in the amount of \$8,288.58, making a total award of \$15,589.40, which is all due and owing, less amounts previously paid.

The November 4, 2010, Award and the November 18, 2010, Award Nunc Pro Tunc of ALJ Yates and the June 5, 2012, Order of SALJ Shelor are affirmed in all other respects.

IT IS SO ORDERED.

Dated this ____ day of January, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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